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The Busy Harbours of Canadian Federalism: The Division of Powers and Its Doctrines in the McLachlin Court

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A. INTRODUCTION

The first century of Canadian legal federalism was largely about heads of power and how they should be interpreted. Canadian constitutional commentators have tracked the ebb and flow of this process, noting the generally pro-provincial bias of the early Privy Council decisions and, later, the restoration of federal powers by the Supreme Court of Canada. By way of example, the federal trade and commerce power was significantly constrained by the Privy Council and later resuscitated by the Supreme Court of Canada.[1] The same could be said of the peace, order, and good government power.[2]

Were one to have become mesmerized by the cyclical interpretive flow of these and other powers, one might have predicted further significant movement in the cycle in Canada's second century, and on into the twenty-first century. However, while important developments still occur,[3] for all

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1 See, for example, *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 [*Snider*], and *Ontario Farm Products Marketing Reference*, [1957] S.C.R. 198.

2 See, for example, *Snider*, *ibid*. and *Munro v. National Capital Commission*, [1966] S.C.R. 663.

3 See the recent Supreme Court of Canada decision in *Fastfrate* interpreting narrowly the transport aspect of federal jurisdiction over federal works and undertakings. (*Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, [2009] 3 S.C.R. 407); and the decision

RÉSUMÉ

Depuis au moins 50 ans les tribunaux canadiens traitent des approches méthodologiques—le caractère véritable, le double aspect, la compétence accessoire, la prépondérance, l'exclusivité des compétences—beaucoup plus du renouvellement de notre compréhension du partage des compétences législatives. Cette tendance est encore plus marquée depuis l'arrivée de la *Loi constitutionnelle de 1982*, vu l'importance de la *Charte* et des droits protégés par l'art. 35. La Cour suprême du Canada fait des efforts afin d'encourager un fédéralisme flexible et coopératif, selon lequel on invalide des lois infréquemment et l'on gère les désaccords au niveau intergouvernemental. Cette tendance persiste sous la direction de la juge en chef McLachlin; la Cour suprême a aussi fait des ajustements importants aux approches méthodologiques afin d'encourager ce genre de fédéralisme coopératif.

intents and purposes, as of approximately 1982, the interpretation of heads of power stabilized. Also as of that year, the Supreme Court of Canada began to take the opportunity to set out clear tests for some of the most important heads of power, rather than to rely on case-by-case determinations. One thinks, once again, of the highest court's treatment of the (general regulation of) trade and commerce power (*General Motors* (1989))[4] and the peace, order, and good government power (*Crown Zellerbach* (1988)),[5] in which the Supreme Court of Canada virtually codified the criteria by which these powers should be judged. The emphasis this time was on stability and predictability. If one thinks of the other business which was preoccupying the Supreme Court of Canada at this time—principally the *Charter of Rights and Freedoms* and section 35 Aboriginal rights—it would not be surprising if, in federalism cases, the Court was essentially attempting to put matters on autopilot, sending a message along the lines of "here are the rules; they are pretty clear; sort things out amongst yourselves intergovernmentally rather than come to court; we are busy with other more pressing matters."

in the *EI Reference* indicating that s. 91(2A) is capable of growth and expansion consistent with changing times (*Reference re Employment Insurance Act (Can.)*, ss. 22 & 23, [2005] 2 S.C.R. 669, 2005 SCC 56).

4 *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 [*General Motors*].

5 *R. v. Crown Zellerbach Canada Ltd*, [1988] 1 S.C.R. 401.

Furthermore, if one thinks of the wide range of constitutional change that was being proposed in the 1980s and 1990s at a political level, the Court's reluctance to weigh in dramatically on one side or the other in federalism cases was even more understandable.[6]

If I am right about this, we have witnessed in the past twenty-five or so years a stabilization in the interpretation of the federal heads of powers, whether because of the advent of the *Charter*, or because of the intensity of constitutional discussion that was occurring for much of this period at a political level, or simply because, after a century of constitutional interpretation devoted principally to the federal division of powers, we were starting to get the hang of it. Does this mean that legal federalism is no longer where the action is? In one sense, relative to the *Charter* and section 35, the answer is clearly yes. Is legal federalism the constitutional equivalent of medieval history, in which new discoveries and new developments are few and far between? It turns out that, despite the relative stability in the interpretation of the division of power, there is still a good deal of important activity in the field of legal federalism. How can this be?

The answer is that, while interpretation of heads of powers is, relatively speaking, steady, there has been and continues to be considerable movement regarding the *doctrines* of Canadian legal federalism. By "doctrines" I mean, generally speaking, the various rules which govern the way courts analyze federalism cases, above and beyond the interpretation of the various heads of power. One thinks, for example, of pith and substance analysis, "the double aspect doctrine," "the ancillary powers doctrine," "the paramountcy doctrine," and of "the interjurisdictional immunity doctrine." And, here, regarding these doctrines, there has been considerable movement in the past twenty-five years, and notably during the first ten years of the McLachlin Court. It should be noted, however, that the aim of this development appears to be, as with interpretation of heads of power, the encouragement of co-operative federalism.

I propose to focus on the evolution of these key constitutional doctrines and methods of analysis in the McLachlin era.[7] However, I would not want

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6 It is relevant to point out that, prior to 1982, legal federalism arguments represented the only means of invalidating federal and provincial legislation. Accordingly, federalism arguments were used even if the main objective was to ensure respect for rights and freedoms. One thinks, for example, of *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580, and *Switzman v. Elbling*, [1957] S.C.R. 285.

7 The analysis which follows is an attempt to determine the direction which the McLachlin Court appears to be taking in division of powers cases. With rare exceptions, it does not

to give the impression that this is the full extent of action in the federalism field. One could add the following to the list: the rules regarding standing, evidence, and justiciability; the increasing importance of international law; the interaction between federalism and the *Charter*; the interaction between federalism and Aboriginal peoples; and the operation of the federal spending power, just to name a few. The doctrines of legal federalism will undoubtedly play an important part in Canadian governments' political decisions regarding such weighty matters as health, the environment, and the management of a competitive economy.

B. STAGES OF ANALYSIS IN LEGAL FEDERALISM CASES

Legal analysis in federalism cases proceeds in three stages, the order of which has become somewhat controversial in recent years.[8] On any view, however, the first stage involves the characterization of any relevant federal or provincial legislation in order to determine its *validity*.[9] Characterization involves a two-step process: first, determination of the pith and substance or dominant feature of the relevant legislation; and second, assignment to the appropriate head of power by virtue of that pith and substance.

Given the recent downgrading of interjurisdictional immunity (the former second stage),[10] it is now appropriate in most legal federalism cases involving a challenge to a provincial legislative measure to analyze second the issue of paramountcy, that is, the existence of conflict with federal provisions, in order to determine whether the provincial measure, though valid, remains operative. Even if a valid provincial measure is inoperative due to federal paramountcy, repeal of the inconsistent federal provisions would render the inoperative provincial measure operative once again.

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attempt to summarize the academic literature regarding the relevant cases.

8 The order of analysis was discussed by the Supreme Court of Canada in *Canadian Western Bank*, a case which will be discussed in detail below.: *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 [*Canadian Western Bank*].

9 In the case of municipal bylaws, for example, these cannot exceed the powers of the provincial legislature, so the analysis regarding validity has a similar basis. See, for example, *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241.

10 The order of division of powers analysis is still controversial, notably in cases involving established situations where interjurisdictional immunity applies; however, where interjurisdictional immunity has not been recognized in the past, it seems clear that paramountcy should now follow on the characterization stage. Given that interjurisdictional immunity situations are the exception rather than the rule, it seems appropriate to state that the stages of legal federalism analysis are now characterization, paramountcy, and interjurisdictional immunity.

The final stage of federalism analysis brings the doctrine of interjurisdictional immunity into play. It is important to remember that interjurisdictional immunity can be relevant even where there is no federal legislation at issue (though federal legislation often is present). The issue with respect to interjurisdictional immunity is not whether federal and provincial law conflict, but whether a valid provincial law of general application should be deemed to apply to federal things (for example, Aboriginal lands), persons (for example, Aboriginal peoples), or undertakings (for example, transportation and communication extending beyond provincial borders).[11]

With these legal federalism fundamentals now set out, I can locate the areas in which the Court made important moves in the past ten years. The first group of these—pith and substance, the double aspect doctrine, and the ancillary powers doctrine—have knock-on effects at all three stages of analysis. The second and third distinct doctrines are the paramountcy and interjurisdictional immunity doctrines themselves. I begin therefore with pith and substance, the double aspect doctrine, and the ancillary powers doctrine.

C. CHARACTERIZATION OF LEGISLATION: PITH AND SUBSTANCE, THE DOUBLE ASPECT DOCTRINE, AND THE ANCILLARY POWERS DOCTRINE

Sections 91 and 92 have an orderly look about them. The reference to "exclusive" jurisdiction, which appears in both sections, gives the impression

11 I have used only examples of interjurisdictional immunity benefitting *federal* things, persons, or undertakings despite the fact that the Supreme Court of Canada confirmed in *Canadian Western Bank* that the doctrine in theory assists the provinces. I have done this for two reasons: first, other than caselaw regarding reading down, there is a dearth of Supreme Court of Canada precedents regarding this type of provincial interjurisdictional immunity; and second, because the Court in *Canadian Western Bank* appeared to have mentioned the point about provincial interjurisdictional immunity as a theoretical point only to discount it as a practical way forward. The Court seemed to be saying that while interjurisdictional immunity was theoretically available to protect both federal and provincial powers, the better way was to reduce the role of the doctrine altogether. The British Columbia Court of Appeal has recently applied interjurisdictional immunity in a manner which appears, with respect, to miss this point: *PHS Community Services Society v. Canada (A.G.)*, 2010 BCCA 15 [*Insite*]. I expect the Supreme Court of Canada to remind us of the point it was trying to make in *Canadian Western Bank* when the appeal from British Columbia is heard. See *Attorney General of Canada et al. v. PHS Community Services Society et al.* (BC), leave to appeal to SCC granted 24 June 2010, SCC File Number 33556. The Court may nonetheless find another way to protect PHS Community Services.

of discrete subject matters. To use a nautical analogy, it is as if each head of power is the anchor which confirms exclusive ownership of a discrete set of marine allotments on which legislation of a particular type could be safely moored. The harbour is divided in two, the provincial anchorages on one side, the federal ones on the other. This was the early understanding of the division of powers, an understanding which is often conveyed using another nautical term: each head of power was said to be a "watertight compartment."

However, it was soon realized that exclusive heads of power, or exclusive anchors, do not necessarily mean exclusivity with regarding to moorings—that is, to the notional surface of water on which legislation was deemed to reside for constitutional purposes. Legislation that was deemed to be, in pith and substance, provincial, could have secondary or incidental effects on federal waters, and vice versa.[12] Pursuing the nautical analogy even further, it became clear that legislation regarding certain subject matters could have multiple potential anchors, whether more than one provincial, more than one federal or, most interestingly, one federal and one provincial. Taking the first two scenarios, provincial legislation can often be anchored, for example, under both section 92(13) (property and civil rights) *and* section 92(16) (local and private matters), and federal legislation can be anchored to both, say, trade and commerce *and* criminal law.

However, the most interesting case, as I have just indicated, is where the same piece of legislation can be anchored to either a federal head of power *or* a provincial head of power. In *Hodge v. The Queen*,[13] the Privy Council recognized that one and the same patch of water—in this case, the subject matter "regulation of taverns"—could be covered by measures anchored in section 91(2) (trade and commerce) and by measures anchored in section 92(16) (local and private matters). As the Privy Council famously stated, "subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91."[14] All depends on the pith and substance analysis.

Now it should be easy to see that if exclusivity lies at the level of heads of power (anchors under water) but not necessarily at the level of subject

12 The law regarding pith and substance analysis and secondary or incidental effects is an important part of federalism analysis. The law regarding secondary or incidental effects did not undergo a significant transition in the first ten years of the McLachlin Court. This explains the emphasis in this chapter on other more fluid parts of the first stage of legal federalism analysis: double aspect and the ancillary powers doctrine.

13 (1883) 9 A.C. 117.

14 *Ibid.* at 130.

matters (moorings at the surface), and if the same patch of water could occasionally be covered by measures secured either using section 91 anchors *or* using section 92 anchors (the "double aspect" doctrine), then it was theoretically possible for federal and provincial measures to simultaneously occupy the same subject matter space. For a time, it was assumed that if Parliament had not yet legislated, the mooring must remain reserved for it; however, that assumption was eventually rejected.[15] By the early 1960s, the courts had come to assume that even if Parliament had already legislated, it should not be assumed to have intended to have the mooring to itself.[16] The "double aspect" doctrine was by that stage in full swing.

How then does the "double aspect" doctrine differ from concurrency? Immigration and agriculture are concurrent powers according to section 95 of the *Constitution Act, 1867*. Section 95 allows both the federal Parliament and the provincial legislatures to legislate regarding these measures (subject to federal paramountcy). Parliament and the provincial legislatures share not just the same mooring but also the same anchor. In the case of the "double aspect" doctrine, both the federal Parliament and the provincial legislatures can legislate regarding the same matter—say, the regulation of taverns or highways—but the anchors are different. At the level of anchors there is an important distinction between concurrency and double aspect, but in terms of surface appearances, double aspect and concurrency are substantially the same. They both result in federal and provincial measures occupying the same patch of water.

We will see in a moment that, whether as a result of concurrency or double aspect, collisions between federal and provincial measures are regulated principally by means of the doctrine of paramountcy, stage two in division of powers analysis. But let us remain with stage one, the characterization stage, for now.

We have seen thus far that the validity of legislation is determined according to its pith and substance; that, once characterized, that same legislation must be anchored to a head of power; and that a single subject matter can be simultaneously governed by federal and provincial legislation, differently anchored. As long as legislation is properly anchored using the two-stage characterization process (pith and substance analysis followed

15 This doctrine was referred to using a land-based analogy: "the doctrine of the unoccupied field." Canadian constitutional analysts cannot agree on whether nautical or land-based analogies are most appropriate. The mixing of metaphors is therefore inevitable.

16 That is to say, even "the doctrine of the occupied field" was rejected by the Supreme Court of Canada.

by assignment to the appropriate head of power), it is, generally speaking, no matter that legislation attached to one head of power incidentally affects heads of power based on the other side of the division of powers.[17] However, all of this assumes that pith and substance of the legislation is uniform. What happens if certain parts of the federal legislation are very different in nature from the rest and, if considered on their own, would be deemed in pith and substance in relation to a provincial subject matter. Or vice versa? One approach would be to nonetheless view the pith and substance of legislation as a whole and to deem "incidental" the admitted effects of certain parts on provincial jurisdiction.[18] Another approach, favoured by litigants determined to find a way past the Supreme Court of Canada's post-1982 tendency to uphold legislation on division of powers grounds, was to target not the legislation as a whole, but particularly egregious parts.

Pursuing still further our nautical analogy, it is as if we cease to view a piece of legislation as a series of barges tethered together and anchored appropriately, and focus instead on any of the tethered barges whose subject matter seems egregiously *hors compétence*.

According to Dickson C.J. in the *General Motors* case, if provisions in a federal Act are in pith and substance in relation to a provincial matter, the provisions can nonetheless be saved if they are part of a federal scheme, and sufficiently integrated into (that is, sufficiently well tethered to) that federal scheme. This will be referred to as the ancillary powers doctrine. The status of the ancillary powers doctrine is controversial, and this is principally for the following reason. As stated above, in the case of legislation (as opposed to tethered barges), there is a fine line between (a) a judge looking at a legislative measure as a whole and deciding that it in pith and substance relates to a federal matter despite "incidental" effects on provincial matters, and (b) a judge isolating the provisions which produce these "incidental effects" and declaring instead that their pith and substance relates to a provincial matter, and as such requires analysis along the lines of the ancillary powers doctrine. It can be confusing to determine which approach is appropriate. However, to my mind, both the double aspect doctrine andthe ancillary powers doctrine should be viewed as different aspects of the general trend of upholding legislation where possible.

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17 One exception to this rule will be discussed under the doctrine of interjurisdictional immunity, below.

18 See Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. supp. (Toronto: Carswell, 2007) at 15.9(c).

Given the fundamental natures of these doctrines and methods of analysis, it may be instructive to see how the McLachlin Court has handled issues regarding pith and substance, especially in relation to double aspect and the ancillary powers doctrine. Has it been inclined, for example, to view legislation as a whole, or to separate it into its more or less controversial parts?

In one of the first cases under the leadership of McLachlin C.J., *Global Securities*,[19] the Supreme Court of Canada was faced with a question regarding the constitutionality of a new provision in the British Columbia *Securities Act*. The new provision authorized the BC Securities Commission to order a registrant to produce records "to assist in the administration of the securities laws of another jurisdiction." Justice Iacobucci set out the structure of the ancillary powers doctrine, but then proceeded to find that the provincial provision in question was *intra vires* the province. Given the strong interprovincial and international commercial aspects of the section in question, it would have been possible for the Court to isolate that provision from the otherwise valid provincial Act, and to run the ancillary powers doctrine analysis discussed above in order to determine whether it was sufficiently integrated into a provincial scheme. Justice Iacobucci, for a unanimous court, preferred to say that the pith and substance of the new provision related to provincial security law, using arguments that might otherwise have been deployed in a *General Motors* analysis to establish the sufficiency of the integration. Justice Iacobucci later confirmed that securities law is furthermore a matter to which the "double aspect" doctrine applies.[20]

In *Mangat*,[21] the Court had to determine whether provisions of the federal *Immigration Act* allowing non-lawyers to represent aliens before the Immigration and Refugee Board (IRB) were valid, and whether BC provisions regarding the qualifications of legal advisors were operative or applicable. Justice Gonthier, for a unanimous court, observed that representation of aliens by counsel before the IRB was a subject matter about which both Parliament and the provinces could legislate, thereby confirming the "double aspect."[22] Justice Gonthier not only confirmed the existence of this "double aspect," but listed other instances of the same phenomenon: highway traffic; securities regulations; insolvency; temperance; interest rates; maintenance of spouses and children, and custody of children; entertainment in

19 *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494 [*Global Securities*].

20 *Ibid*. at para. 46.

21 *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113 [*Mangat*].

22 *Ibid*. at paras. 47 & 48.

taverns and gaming;[23] and provided a further reference to Hogg's work, *Constitutional Law of Canada*,[24] on the matter.[25] In listing double aspects in this way, the Court appeared to be in no way backing off from continuing to recognize them. With the finding of a double aspect even with respect to representation by counsel, Gonthier J. concluded that it was not necessary to pursue the ancillary powers doctrine approach.[26]

In the *Kitkatla* case,[27] the distinction between an ancillary powers doctrine approach isolating the impugned provisions, and a pith and substance approach applied to the whole Act, was squarely identified by the Court. The measure at issue was the British Columbia *Heritage Conservation Act*. Sections 12(2)(a) and 13(2)(c) and (d) of the Act granted a provincial minister discretion to allow alteration or removal of Aboriginal heritage objects in the province, in this case, culturally modified trees. All the parties agreed that the province had jurisdiction to protect heritage or cultural property, but the appellants argued that the above-noted provisions related instead to Aboriginal affairs, a matter of federal jurisdiction. Justice LeBel observed that the parties disagreed fundamentally as to how the characterization stage, and especially the pith and substance analysis, should be conducted:

> The appellants tend to emphasize the characterization of the impugned provisions outside the context of the Act as a whole. The respondents and interveners take the opposite view, placing greater emphasis on the pith and substance of the Act as a whole. The parties also disagree as to the order in which the analysis should take place: the appellants favour looking at the impugned provisions first, while the respondents and interveners tend to prefer to look at the Act first.[28]

Justice LeBel stated that the proper approach was to first look to the challenged provision, and he cited Dickson C.J. in *General Motors* by way of authority.[29] Justice LeBel restated Dickson C.J.'s test as follows:

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23 A double aspect in "gaming" was confirmed by the McLachlin Court in *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6.

24 Above note 18.

25 *Mangat*, above note 21 at para. 49.

26 *Ibid.* at para. 50.

27 *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146 [*Kitkatla*].

28 *Ibid.* at para. 55.

29 *Ibid.* at para. 56. It is submitted that this is still the correct approach despite the difference of approach in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 [*Re Assisted*

1) Do the impugned provisions intrude into a federal head of power, and to what extent?
2) If the impugned provisions intrude into a federal head of power, are they nevertheless part of a valid provincial legislative scheme?
3) If the impugned provisions are part of a valid provincial legislative scheme, are they sufficiently integrated with the scheme?[30]

According to LeBel J., "the first stage of the analysis requires a characterization of the impugned provision in isolation, looking at both their purpose and effect."[31] This is the "pith and substance" stage. Justice LeBel concluded that the measures were essentially aimed at heritage conservation within the province, despite the admittedly disproportionate effects on Aboriginal people and their cultural artifacts. As in *Global Securities*, arguments that were used to establish the provincial nature of the provisions could have been deployed at a later stage of the ancillary powers doctrine, even if the provincial provisions had been declared *prima facie* federal in nature. The Court seemed keen to cite the ancillary powers doctrine but equally keen to avoid having to proceed beyond the first stage of the *General Motors* test. That was to change in the 2005 *Kirkbi* case.[32]

In *Kirkbi*, the appellants were the holders of the trademark for LEGO construction sets. Ritvik Holding, a Canadian competitor company producing similar sets, challenged the constitutionality of section 7(b) of the federal *Trade-marks Act* which created a civil cause of action, deployed by the appellants, essentially codifying the common law tort of passing off. Justice LeBel, for a unanimous Court, restated the ancillary powers doctrine, noting that "it is necessary to consider both the impugned provision and the Act as a whole when undertaking constitutional analysis."[33] After analyzing the pith and substance of section 7(b) he concluded that the provision truly encroached on an important aspect of provincial jurisdiction over property and civil rights, but that the extent of the encroachment was minimal.[34] That is, unlike in *Global Securities* and *Kitkatla*, the impugned provision was in pith and substance an intrusion, so it was necessary here to proceed to stages

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Human Reproduction Act]. Difficulties arise, as there were multiple provisions requiring ancillary powers doctrine analysis; however to date, this has not been the most common scenario.

30 *Ibid.* at para. 58.

31 *Ibid.* at para. 59.

32 *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302 [*Kirkbi*].

33 *Ibid.* at para. 21.

34 *Ibid.* at para. 27.

two and three of the ancillary powers doctrine analysis. Justice LeBel confirmed the validity of the federal *Trade-Marks Act* (stage two of the ancillary powers doctrine) and then proceeded to assess the extent of the integration of section 7(b) into the otherwise valid federal Act. Given that the encroachment on provincial jurisdiction was minimal, it was necessary to show only that there was a "functional relationship" between the impugned provision and the Act as a whole (stage three of the ancillary powers doctrine).[35] Justice LeBel concluded that section 7(b) played a clear role in the federal scheme and was therefore "sufficiently integrated."[36] In this case, one can easily imagine the arguments regarding sufficiency of integration being redeployed as reasons why the Act as a whole was in pith and substance federal, the effects of section 7(b) being regarded in the normal way as "merely incidental."

In the seminal 2007 case, *Canadian Western Bank*, the Supreme Court of Canada returned to the subject of the double aspect doctrine. Whereas the doctrine began in *Hodge* and in the early 1960s as an acknowledgment that some legislation has both a federal and provincial aspect, the Court in *Canadian Western Bank* presented it in its contemporary form as a frank acknowledgment that numerous "matters" are, by their very nature, impossible to categorize under one head of power. The importance of the double aspect doctrine was no longer limited to findings of validity regarding a single piece of legislation; it was part of a philosophy of federalism:

> The double aspect doctrine, as it is known, which applies in the course of a pith and substance analysis, ensures that the policies of the elected legislators of both levels of government are respected . . . . The double aspect doctrine recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered, that is, depending on the various "aspects" of the "matter" in question.[37]

It is easy to get lost in the intricacies of pith and substance, "double aspects," the ancillary powers doctrine analysis, and nautical analogies of dubious utility. But the bottom line is that the Supreme Court of Canada is obviously inclined not to put obstacles in the way of federal and provincial legislative intentions, provided that they comply with *Charter* and section 35 requirements. The double aspect doctrine allows for federal and provin-

35 *Ibid.* at para. 33. If the provision had been "highly intrusive," it would have had to qualify as "truly necessary" or "integral" in order to pass muster at stage three.

36 *Ibid.* at para. 36.

37 *Canadian Western Bank*, above note 8 at para. 30.

cial legislation regarding an ever-increasing list of subject matters. And even where no double aspect exists and a certain provision appears to offend the division of powers, the ancillary powers doctrine allows such provisions to remain valid as a result of their integration into an otherwise valid legislative scheme, rather than face severance or, worse, bringing down the whole Act. While there are sure to be cases in the future where legislators exceed even these generous jurisdictional terms, the broad trend is highly facilitative. As I stated earlier, the courts' general willingness to uphold legislation on federalism grounds means that there is considerable pressure on the intergovernmental process to ensure the smooth running of the federation.[38]

One of the potential consequences of recognizing double aspects and of providing means via the ancillary powers doctrine of saving provisions which would be *ultra vires* on their own but for that analysis, is that there are, so to speak, many legislative boats and barges moored in Canadian waters. The doctrines of paramountcy and interjurisdictional immunity provide the courts with means of policing the jurisdictional overlaps inevitably caused by the Supreme Court of Canada's approach to the first stage of division of powers analysis. However, we will see that the Court has been reluctant to set out doctrines that would necessitate frequent court intervention. Paramountcy and, more recently, interjurisdictional immunity have both been weakened. The general rule in Canadian federalism waters is to keep a keen watch and to maintain bumpers in place.

D. THE PARAMOUNTCY DOCTRINE

Assuming that we are presented with one or more valid federal laws and one or more valid provincial laws, collisions may occur. Collisions between federal and provincial laws are governed by the paramountcy doctrine, with priority given to federal law where true conflict has been identified. The difficulty regarding paramountcy lies in identifying when true conflicts exist, justifying application of the paramountcy doctrine, and resulting inoperability.

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38 As the Binnie and LeBel JJ. stated in *Canadian Western Bank*: "the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called 'co-operative federalism.'" *Ibid.* at para. 24. See also *ibid.* at para. 37: "The 'dominant tide' finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government."

As indicated, "there are sure to be cases . . . where legislators exceed even these generous jurisdictional terms." See, for example, *Re Assisted Human Reproduction Act*, above note 29.

The modern law regarding paramountcy was set out in yet another key case from the 1980s, this one decided just months after the arrival of the *Constitution Act, 1982* coming into force, and no doubt in awareness of powerful new grounds (based in the *Charter* and in section 35 Aboriginal rights) for challenging federal and provincial legislation. In *Multiple Access v. McCutcheon*,[39] Dickson J. (as he then was) set out the test for paramountcy as follows:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.[40]

By wording the test for paramountcy in this way, Dickson J. seemed to be reserving paramountcy and resulting inoperability only for cases where Canadian citizens (and courts, though this point was not yet emphasized) are effectively being given contradictory messages. The *Multiple Access* test seemed to leave plenty of room for provincial provisions which duplicated or supplemented federal provisions dealing with the same subject matter.

While this test gave the courts little reason to intervene in legal federalism disputes, as was probably intended, it may have overlooked one particularly problematic scenario. We have already seen that the existence of a federal statute dealing with a particular matter does not preclude the province from legislating regarding that same matter if it has a section 92 anchor—there is no longer a "doctrine of the occupied field." However, what happens if Parliament legislates so as to regulate an area minimally because it believes that minimal regulation is a good legislative choice, and the province then takes advantage of the free regulatory space to impose its own (less-than-minimal) choices? The citizen is arguably not being given a contradictory message, but there is clearly tension between the federal and provincial legislative aims. This is essentially what occurred in the 1990 case of *Bank of Montreal v. Hall*.[41] While attempting to remain within the ratio of *Multiple Access*, La Forest J. resolved this question in the following way:

> A showing that conflict can be avoided if a provincial Act is followed to the exclusion of a federal Act can hardly be determinative of the question

39 [1982] 2 SCR 161 [*Multiple Access*].

40 *Ibid.* at 191.

41 [1990] 1 S.C.R. 12.

> whether the provincial and federal acts are in conflict, and, hence, repugnant. That conclusion, in my view, would simply beg the question. The focus of the inquiry, rather, must be on the broader question whether operation of the provincial Act is compatible with the federal legislative purpose.[42]

Multiple Access and *Hall* were clearly the leading cases regarding paramountcy as the McLachlin Court took Canada into the twenty-first century. The former justified a *laissez-faire* approach by the courts, while the latter justified what had become rare interventionism. The question for the McLachlin Court, therefore, was which leading case would truly lead: were they equal branches of a broad paramountcy doctrine, or was *Hall* merely an exception to the general *Multiple Access* rule?

The first case to deal with the question, though in fairly brief terms, was *Spraytech*[43] in which landscaping and lawn care companies operating in the suburbs of Montreal challenged a municipal bylaw prohibiting the use of certain pesticides. The pesticides in question had been approved by the federal *Pest Control Products Act* (*PCPA*). In dealing with the claim that the bylaw was inoperative by reason of federal paramountcy, L'Heureux-Dubé J. noted that the *PCPA* regulated which pesticides can be registered for manufacture and distribution in Canada, and that the Act was permissive rather than exhaustive. Accordingly she found no operational conflict on the terms of *Multiple Access*. She added, with reference to *Hall*, that there was "no concern in this case that application of [the] By-law . . . displaces or frustrates 'the legislative purpose of Parliament.'" If anything the *Multiple Access* and *Hall* cases seemed to have equal relevance.

The next, more significant, case dealing with paramountcy was *Mangat*,[44] a case discussed earlier under the heading of "double aspect." As we have already seen, Mangat was an immigration consultant carrying on work in the province of British Columbia, including appearances as counsel or advocate for "aliens" before the Immigration and Refugee Board (IRB) for a fee. The Law Society of British Columbia applied for an injunction preventing Mangat from engaging in what it viewed as the practice of law in contravention of section 26 of the BC *Legal Profession Act*. Mangat claimed in turn that his work was justified under sections 30 and 69(1) of the federal *Immigration Act* which permitted non-lawyers to appear on behalf of clients before the IRB.

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42 *Ibid.* at 155.

43 *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241.

44 *Mangat*, above note 21.

The relevant question before the court was whether section 26 of the BC Act was inoperative with respect to persons acting by virtue of sections 30 and 69(1) of the federal Act.

Regarding the paramountcy argument, Gonthier J. began by saying that sections 30 and 69(1) demonstrated Parliament's intention to regulate immigration counsel who are not members of the provincial bar. Justice Gonthier summarized the *Multiple Access* test by quoting from the earlier case where Dickson J. referred to a scenario in which "one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other."[45] He then cited La Forest J. in *Hall*, referring to it as "a gloss"[46] on the implications of *Multiple Access*. Following the "expanded version"[47] of *Multiple Access* afforded by *Hall*, Gonthier J. concluded that compliance with both the provincial and federal Acts was not possible and stated, "To require 'other counsel' to be a member in good standing of the bar of the province or to refuse the payment of a fee would go contrary to Parliament's purpose in enacting ss. 30 and 69(1) of the *Immigration Act*."[48] Justice Gonthier distinguished *Spraytech* where compliance with the municipal bylaw did not frustrate Parliament's purpose. *Mangat* reaffirmed the importance of *Hall*, but left its status in relation to *Multiple Access* unclear. This status was resolved in the *Rothmans* case, and even more authoritatively so in *Canadian Western Bank* and *Lafarge*.[49]

In *Rothmans*, a manufacturer of cigarettes sought a declaration that section 6 of the Saskatchewan *Tobacco Control Act* was inoperative by virtue of the fact that it was inconsistent with section 30 of the federal *Tobacco Act*. Section 30 allowed retailers to display tobacco and tobacco product–related brand elements and post signs indicating the availability and price of tobacco products, while section 6 of the Saskatchewan Act banned all advertising, display, and promotion of tobacco or tobacco-related products in any premises in which persons under eighteen years of age were permitted. Justice Major, for a unanimous Court, made it clear that the doctrine of paramountcy had two distinct branches, based respectively in *Multiple Access* and *Hall*:

> The doctrine of federal legislative paramountcy dictates that where there is an inconsistency between validly enacted but overlapping provincial

45 *Multiple Access*, above note 39 at 191, cited in *Mangat*, *ibid*. at para. 69.

46 *Multiple Access*, *ibid*. at par.a 70.

47 *Ibid*. at para. 72.

48 *Ibid*.

49 *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188.

> and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency. *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, is often cited for the proposition that there is an inconsistency for the purposes of the doctrine if it is impossible to comply simultaneously with both provincial and federal enactments . . . .
>
> However, subsequent cases indicate that impossibility of dual compliance is not the sole mark of inconsistency. Provincial legislation that displaces or frustrates Parliament's legislative purpose is also inconsistent for the purposes of the doctrine. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at p. 155, La Forest J wrote . . . . See also *Spraytech*, at para. 35, and *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, at paras. 69–70.
>
> . . .
>
> It follows that in determining whether s. 6 of *The Tobacco Control Act* is sufficiently inconsistent with s. 30 of the *Tobacco Act* so as to be rendered inoperative through the paramountcy doctrine, two questions arise. First, *can a person simultaneously comply* with s. 6 of *The Tobacco Control Act* and s. 30 of the *Tobacco Act*? Second, does s. 6 of *The Tobacco Control Act frustrate Parliament's purpose* in enacting s. 30 of the *Tobacco Act*?[50]

While emphasizing both the *Multiple Access* and *Hall* aspects of paramountcy, Major J. took one further step, identifying the *Hall* principle as effectively acting as the common denominator: "In my view, the overarching principle to be derived from *McCutcheon* and later cases is that *a provincial enactment must not frustrate the purpose of a federal enactment*, whether by making it impossible to comply with the latter or by some other means."[51] In *Rothmans* itself, Major J. concluded that neither branch of the paramountcy doctrine was engaged; however, by emphasizing "frustration of federal purpose" he made available a powerful weapon for litigants seeking to render provincial enactments inoperative, and this, seemingly, against the general tendency of the Court since 1982. Subsequent cases brought *Rothmans* back into line, however, as we will see.

We will study the facts of *Canadian Western Bank* and *Lafarge* more closely in a moment, under the heading of interjurisdictional immunity, but for present purposes it is important to note that these cases solidify a two-branch paramountcy doctrine based around *Multiple Access*, first, and *Hall*, second.

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50 *Ibid.* at paras. 12–13 and 15 [emphasis added].

51 *Ibid.* at para. 14 [emphasis added].

In *Canadian Western Bank* we see a rendition of the paramountcy doctrine that sets out its two branches clearly and distinctly. Justices Binnie and LeBel further emphasized that the burden of proof is on the party alleging paramountcy:

> To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing *either* that it is *impossible to comply* with both laws *or* that to apply the provincial law would *frustrate the purpose* of the federal law.[52]

However, the majority judges were also intent in making sure that the second (or *Hall*) branch was not allowed to overwhelm the general *laissez-faire* nature of the *Multiple Access*–inspired rule. They did so in fairly emphatic terms, stating that "care must be taken not to give too broad a scope to *Hall*, *Mangat* and *Rothmans*."[53] They underlined the point by affirming that "frustration of federal purpose" was never intended to affect a return to the "doctrine of the occupied field" that had been rejected in the early 1960s. In the words of Binnie and LeBel JJ., "the fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject."[54] Rather, the presumption worked in the opposite direction: the coexistence of federal and provincial laws was to be expected. The majority reasons were intent on encouraging a flexible version of federalism: "To interpret incompatibility broadly has the effect of expanding the powers of the central government, whereas a narrower interpretation tends to give provincial governments more latitude."[55]

Justices Binnie and LeBel also attempted to clarify a few smaller points regarding paramountcy. A point that will reappear in the discussion of interjurisdictional immunity but which is also relevant here is that the Court is in favour of a "firm application of pith and substance analysis," including reading down, in order to resolve some of the problems that arise as a result of some of the more troublesome incidental effects of legislation: "The flexible nature of the pith and substance analysis makes it perfectly suited to the modern views of federalism in our constitutional jurisprudence."[56] A further

52 *Canadian Western Bank*, above note 8 at para. 75 [emphasis added].
53 *Ibid.* at para. 74.
54 *Ibid.*
55 *Ibid.* at para. 70.
56 *Ibid.* at para. 31.

point was that the Court appeared to be emphasizing that incompatibilities justifying paramountcy can occur between any provisions in federal and provincial legislation, whether those provisions are justified by global pith and substance analysis or by the ancillary powers doctrine.[57]

The Court found no reason to apply the paramountcy doctrine in *Canadian Western Bank*. The doctrine was applied, however, in the companion case, *Lafarge*,[58] though in circumstances which made its application somewhat unconvincing. The question at issue in the case was essentially whether the City of Vancouver should have insisted that Lafarge Canada obtain a city development permit in advance of building an integrated ship offloading/concrete batching facility on waterfront lands owned by the Vancouver Port Authority (VPA). In their defence, Lafarge, the city, and the VPA argued that VPA lands enjoyed interjurisdictional immunity (as federal public property or as a federal undertaking) and, in the alternative, that the inconsistency between federal and provincial building rules regarding this land should be resolved in favour of the former by application of the doctrine of paramountcy. The province claimed that dual compliance was clearly possible: Lafarge simply needed to obtain building permits from both the VPA and the city. The problem with this argument was that city bylaws imposed a 30-foot height restriction which the Lafarge project clearly breached. At this stage, the fact that Lafarge had not applied for a city permit became important. Apparently, it was possible for the city to waive the 30-foot height requirement, but no request to exercise this discretion had been made. On the federal side, the *Canadian Marine Act*, section 48, authorized land use controls and procedure for uses related to shipping. Such controls and procedures had been set out in a document entitled Port 2010, and these, rather than the city bylaws were deemed to apply to Lafarge. Despite the fact that the city's discretion had not been tested, the Supreme Court of Canada took the view that federal paramountcy applied. The Court described the inconsistency in the conditional:

> It *would* be within the City's discretion to waive the height limit up to 100 feet, but that *would* impose the condition precedent of an exercise of discretion by the City to approve a project that has already been approved by the VPA. This *would* create an operational conflict that *would* flout the federal purpose, by depriving the VPA of its final decisional authority on

57 *Ibid.* at para. 69.

58 *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86 [*Lafarge*].

> the development of the port, in respect of matters which fall within the legislative authority of Parliament.[59]

The test for paramountcy which the Court applied was that which had been set out in *Canadian Western Bank*: "The party raising the issue must establish the existence of valid federal and provincial laws and the impossibility of their simultaneous application by reason of an operational conflict or because such application would frustrate the purpose of the enactment."[60] The Court found both an operational conflict and frustration of the federal purpose. It may be significant that, regarding the operational conflict, the Court cited *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*,[61] and in so doing emphasized the conflicted position a judge would be in on this issue, given the existence of the federal and municipal rules.

It is also important to read *Lafarge* in the context of its partner case, *Canadian Western Bank*. As we will see, the latter case significantly reduced the protection which federal undertakings received as a result of interjurisdictional immunity. In that case, the Court reminded the federal authorities that they retain the option of clearly setting out their preferences and in so doing attempting to invoke federal paramountcy. The partner case, *Lafarge*, then became an example of just that.

The final case which should be mentioned in this discussion of paramountcy is the Court's 2009 decision in *Chatterjee*.[62] In the first paragraphs of the judgment, before reciting the facts, Binnie J. set out a reminder of the understanding of federalism which animates the McLachlin Court, quoting from his own judgment in *Canadian Western Bank*:[63] "a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government."[64] The Ontario *Remedies for Organized Crime and Other Unlawful Activities Act, 2001* (*Civil Remedies Act)* (CRA) was enacted to deter crime and compensate victims. Its main instrument was an *in rem* civil action to effect forfeiture of the proceeds of crime. As summarized by Binnie J.:

> In essence, therefore, the *CRA* creates a property-based authority to seize money and other things shown on a balance of probabilities to be tainted by crime and thereafter to allocate the proceeds to compensating victims

59 *Ibid*,. at para. 75 [emphasis added].
60 *Ibid*. at para. 77.
61 [1999] 2 S.C.R. 961.
62 *Chatterjee v. Ontario (Attorney General)*, [2009] 1 S.C.R. 624 [*Chatterjee*].
63 Above note 8 at para. 37.
64 *Chatterjee*, above note 62 at para. 2 [emphasis in the original].

> of and remedying the societal effects of criminality. The practical (and intended) effect is also to take the profit out of crime and to deter its present and would-be perpetrators.[65]

After noting both the criminal and property aspects of the legislation, Binnie J. concluded that the CRA was in pith and substance in relation to property and therefore properly anchored in section 92(13) "property and civil rights." In the spirit of flexible, co-operative federalism, he issued a by now familiar reminder that the assignment to a section 92 anchor did not mean that section 91 was unaffected: "I agree that the *CRA* was enacted 'in relation to' property and civil rights and may incidentally 'affect' criminal law and procedure without doing violence to the division of powers."[66]

However, even if the provincial law was valid, and even if incidental effects on the federal criminal law power were thereby permitted, it was still necessary to consider whether any of the CRA provisions should be declared "inoperative" by virtue of either of the two branches of paramountcy so clearly laid out in *Canadian Western Bank* and *Lafarge*, a paramountcy doctrine which Binnie J. pointedly referred to as "restrained."[67] Justice Binnie could find neither operational conflict nor frustration of federal purpose. Without purporting to set out a new test, he identified the common denominator between the two branches in terms of compromising the proper functioning of federal legislation: "The Constitution permits a province to enact measures to deter criminality and to deal with its financial consequences so long as those measures are taken in relation to a head of provincial competence and do not *compromise the proper functioning* of the *Criminal Code* including the sentencing provisions."[68]

If we return to the image of the crowded harbour of Canadian federalism imagined earlier, it seems clear that the Supreme Court of Canada is not intent on policing these waters. In the spirit of what is now a refrain in this chapter, it would appear that the onus is on federal and provincial actors to steer carefully, communicate frequently, and maintain a good set of bumpers.

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65 *Ibid.* at para. 23.

66 *Ibid.* at para. 30. See also para. 32: "Co-operative federalism recognizes that overlaps between provincial and federal laws are inevitable."

67 *Ibid.* at para. 36.

68 *Ibid.* at para. 40 [emphasis added].

E. THE INTERJURISDICTIONAL IMMUNITY DOCTRINE

As described earlier, the issue with respect to interjurisdictional immunity is not whether federal and provincial law conflict, but whether, to take the most familiar examples, a valid provincial law of apparently general application should be deemed to apply to federal things, persons, or undertakings. In the case of the best-known instances of interjurisdictional immunity—banks, interprovincial transportation and communication undertakings, and Aboriginal lands and peoples, the federal thing, person, or undertaking is present and active in the province and ostensibly subject to the multiple provincial measures that have been enacted over the years to regulate land, individuals, and companies existing, living, and operating within the province. And yet if, for example, the plentiful, validly anchored provincial laws of a general nature regarding hunting and land use applied to Aboriginal peoples and lands,[69] and if provincial laws regarding key labour relations matters applied to airlines, television companies, and banks, then federal jurisdiction over Aboriginals and Aboriginal lands, interprovincial undertakings, and banks would not be exclusive either at the level of anchors or at the surface level. Interjurisdictional immunity protects these things, persons, and undertakings from the direct and the incidental effects of legislation anchored on the other side of the division of powers, without the need for Parliament to assert its exclusive jurisdiction by means of the paramountcy doctrine. It should now be possible to see why interjurisdictional immunity is such a useful protection for federal things, persons, and undertakings which would otherwise be overwhelmed with provincial regulation in the natural course of events, and why, as a doctrine of general application to sections 91 and 92 of the *Constitution Act, 1867*,[70] it runs counter to the contemporary current of legal federalism as articulated by the McLachlin Court.

In fact, the "problem" with an interjurisdictional immunity doctrine of general application ran deeper than this. For historical and even for logical reasons (from one perspective), interjurisdictional immunity analysis was

69 By virtue of s. 88 of the *Indian Act*, a number of these provincial laws are incorporated by reference by Parliament, but this is a federal choice rather than an inevitability of the division of powers.

70 If interjurisdictional immunity is a doctrine of general application to ss. 91 and 92 then this amounts to saying that each head of power has a basic, minimum, and unassailable content upon which legislation from across the division of powers may not encroach, whether directly or incidentally. See, for example, the doctrine as described by Braidwood J.A. in *Kitkatla*, above note 27 at para. 19.

the second stage in division of powers cases, ahead of paramountcy. The logic behind this, as explained by Bastarache J. in his separate reasons in *Canadian Western Bank* and *Lafarge*, is that interjurisdictional analysis can dictate that a law not apply in a particular context, and thereby avoid what would otherwise have been an operational conflict between the two laws. For example, if interjurisdictional immunity makes it clear that provincial health and safety laws regulating pregnant employees who work in front of certain types of computer screens do not apply to bank employees, then there is no need to consider whether the provincial law and the *Canada Labour Code* provisions regarding the same subject matter are inconsistent. However, the logic which has just been described in a classic interjurisdictional immunity case breaks down when the doctrine can be argued in any and all division of powers cases. In all but the exceptional classical instances of interjurisdictional immunity, the doctrine can be said to amount to a life raft deployed by litigants to resist the implications of the sort of flexible, co-operative federalism that is described already and, most emphatically, in *Canadian Western Bank*.

A problem related to the prominent position of interjurisdictional immunity in the various stages of legal federalism analysis was that the test for the doctrine was famously difficult for the Supreme Court to pin down and for the lower courts and legal advisors to apply.[71] Accordingly it was an infamous generator of constitutional litigation and instigator of lengthy, convoluted argument. Indeed, interjurisdictional immunity was an obvious target for a Court concerned with developing the doctrines of legal federalism so as to favour flexibility, co-operation, and increased legal certainty. Let us now look at the McLachlin Court's caselaw in this area.

The first McLachlin Court encounter with the interjurisdictional immunity doctrine was the *Mangat* case, described earlier. That which was not described earlier was that the British Columbia Court of Appeal, unanimous as to the result in allowing the appeal, had divided on whether it should do so on the basis of interjurisdictional immunity or paramountcy. Justice Gonthier, for a unanimous Supreme Court of Canada, agreed that paramountcy was the preferable basis on which to decide the appeal, but his comments regarding the order and preferability of the interjurisdictional immunity and paramountcy doctrines were of particular interest. Justice

71 The test shifted even at the Supreme Court of Canada level, often in lengthy, complicated judgments: see *Commission du Salaire Minimum v. Bell Telephone Co.*, [1966] S.C.R. 767; *Bell Canada v. Quebec*, [1988] 1 S.C.R. 749 [*Bell* (1988)]; and *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927.

Gonthier argued that the existence of a double aspect favoured the application of paramountcy rather than interjurisdictional immunity. The latter doctrine would have had the result of excluding provincial jurisdiction regarding representation of aliens before the IRB, whereas paramountcy safeguarded parliamentary control over the tribunal it had created, while preserving the principle of general provincial control over the legal profession. In this respect, the paramountcy doctrine was more "supple" than interjurisdictional immunity.[72] It was not clear at this stage whether the order of division of powers analysis depended on the facts of the case, but clearly it was no longer obligatory to consider interjurisdictional immunity second, following immediately after the characterization of the legislation.

The second McLachlin Court case regarding interjurisdictional immunity was *Kitkatla*, another case that has already been discussed. Once again, it is important to note that the British Columbia Court of Appeal had been considerably preoccupied with issues regarding interjurisdictional immunity. It should also be noted, however, that "Indians and Indian lands" is a long-standing category of interjurisdictional immunity analysis. In *Kitkatla*, LeBel J. appeared to discuss interjurisdictional immunity issues ahead of paramountcy—issues such as "impairment" of the "core" of the Aboriginal identity appeared to be rolled into an exploration of the effects of provincial legislation on federal powers (that is, question 1 of the ancillary powers doctrine analysis)—but then interjurisdictional immunity received its formal discussion and rapid disposition after paramountcy. Thus *Kitkatla* perpetuated the uncertainty about what the McLachlin Court was doing with the order, preferability, and substance of the interjurisdictional immunity doctrine.

Kitkatla was yet another unanimous decision by the McLachlin Court, but it may be important to point out that the future dissenter on interjurisdictional immunity, Bastarache J., did not sit on the case. In *Canadian Western Bank* and *Lafarge* it became apparent that the majority of the Court had different views than Bastarache J. regarding numerous aspects of the interjurisdictional immunity doctrine.

The facts of *Lafarge* have already been set out, but *Canadian Western Bank* has not yet been introduced. It is important, first of all, to know that banking,[73] like incorporation of companies with other-than-provincial objects more generally, is an established category of interjurisdictional

72 *Mangat*, above note 21 at paras. 52–54.

73 This despite the fact the definition of banking was, for a time, in doubt: see *Canadian Pioneer Management v. Labour Relations Board of Saskatchewan*, [1980] 1 S.C.R. 433.

immunity. It should be easy to see that if the vast range of provincial legislation regulating companies applied to banks, it would be difficult for Parliament to have real control over banking (section 91(15)) unless it filled all the gaps in its jurisdiction by means of paramountcy legislation. Interjurisdictional immunity preserves banking jurisdiction without Parliament having to legislate to protect that jurisdiction, but important questions remained regarding the extent of that protection. *Canadian Western Bank* began to answer those questions.

The relevant facts of the case are as follows. The federal *Bank Act* defines who is a bank and in what activities banks are free to engage. Canadian Western Bank qualified as a bank and, ever since the early 1990s, in addition to the familiar activities of banking, banks were allowed to offer a range of insurance products, including mortgage protection insurance, personal accident insurance, and travel insurance. The Alberta *Insurance Act* of 2000 in turn regulated the sale of insurance, including the sort of credit-related insurance now permitted by the federal *Bank Act*. There was no question regarding the validity of the Alberta *Insurance Act*. Insurance has been a proper subject of provincial legislation since the nineteenth century. The constitutional questions in the case related, first, to whether the *Insurance Act* and its regulations were applicable to the promotion of authorized insurance in banks (the interjurisdictional immunity argument) and, second, to whether the Alberta Act and regulations were inoperative in relation to the federal legislation (the paramountcy argument).

The Court in *Canadian Western Bank* was not content to answer the questions in the traditional way. From the outset, it was determined to delineate, or at least confirm, the new approach to legal federalism that first appeared in the early 1960s but which consolidated as of 1982. As already noted, the Court wished to facilitate co-operative federalism, not by intervening on a case-by-case basis, but by affirming clear guiding principles, and allowing governments to get on with things:

> As the final arbiters of the division of powers, the courts have developed certain constitutional doctrines, which, like the interpretations of the powers to which they apply, are based on the guiding principles of our constitutional order. The constitutional doctrines permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers. The doctrines must also be designed to reconcile

> the legitimate diversity of regional experimentation with the need for national unity. Finally, they must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called "co-operative federalism."[74]

With these principles in mind, the Court then analyzed the key doctrines and methods of analysis of legal federalism—pith and substance, paramountcy, and interjurisdictional immunity. The case is, in many ways, a complete course in the fundamentals of the Canadian division of powers. We have already seen what the Court said regarding pith and substance and paramountcy. The real importance of the case is with respect to interjurisdictional immunity. Here, the Court innovated in at least three ways: (1) the test for interjurisdictional immunity was clarified in terms which make its successful invocation less likely; (2) interjurisdictional immunity was confined to contexts in which it has already been applied, to cases where precedents already exist; and (3) in jurisdictional contexts where interjurisdictional immunity has not already been recognized, it was appropriate to move from characterization (validity) to paramountcy (operability) rather than attempting to carve out new contexts for interjurisdictional immunity. Of course, this summary of the importance of the case is too brief and lacks subtlety, so it may be helpful to look more closely at what the Court actually said.

We have already noted in *Kitkatla* that LeBel J. discussed interjurisdictional immunity issues at the characterization stage in considering the effect of provincial legislation on federal aspects before returning more formally to interjurisdictional immunity later on in his analysis. In *Canadian Western Bank*, Binnie and LeBel JJ. spoke first of the normal interaction of provincial and federal legislation given "double aspects" and "incidental effects." Where problems arise due to incidental effects (and here one can easily have in mind interjurisdictional immunity scenarios) they recommended "a firm application of the pith and substance analysis."[75] They acknowledge that "the scale of the alleged incidental effects may indeed put a law in a different light so as to place it in another constitutional power," but they then observe that "the usual interpretation techniques of constitutional interpretation, such as reading down, may then play a useful role."[76] This sounds

74 *Canadian Western Bank*, above note 8 at para. 24.

75 *Ibid.* at para. 31.

76 *Ibid.*

a good deal like interjurisdictional immunity. So even though the doctrine is downgraded at least in terms of the stages in division of powers litigation, some of the effects of the doctrine may be accomplished earlier in the analytical process when discussing pith and substance. This observation was perhaps intended to address some of Bastarache J.'s concern regarding the logical need to discuss interjurisdictional immunity ahead of paramountcy. However, reading down is normally available only where two interpretations of a law (say, provincial) are possible and where one would result in the law being characterized as in relation to a matter that cannot be attributed to a provincial head of power. It is not usually used where the "incidental effects" on federal powers are read out of the provincial statutory instrument. Accordingly, the Court has some future work to do in explaining the nature of "a firm application of the pith and substance doctrine."

It is also important to remember that the value of interjurisdictional immunity is not exhausted by the sort of weak reading down that has just been noted. At its full deployment, the doctrine operates to deflect all intrusions, whether frontal or incidental.[77] Accordingly, it is still important to discuss the contemporary nature of the doctrine and to determine the point at which it should be considered in division of powers analysis.

On one view of interjurisdictional immunity, it is a doctrine which applies to some extent to each and every head of power in sections 91 and 92. Justices Binnie and LeBel are clearly not of this view. They refer to the doctrine as one "of limited application."[78] Though they cite broader elaborations of the doctrine, such as that expressed by Beetz J. in *Bell Canada (1988)*,[79] they seem to view the doctrine as a relic of the "watertight compartments" approach to the division of powers.[80] In their view, the tide of constitutional analysis has turned and no longer favours interjurisdictional immunity. They cite Dickson C.J. who first expressed the idea that interjurisdictional immunity was increasingly out of favour:

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77 Justices Binnie and LeBel make this point clear at para. 32:

> That being said, it must also be acknowledged that, in certain circumstances, the powers of one level of government must be protected against *intrusions*, even incidental ones, by the other level. For this purpose, the courts have developed two doctrines. The first, the doctrine of interjurisdictional immunity, recognizes that our Constitution is based on an allocation of exclusive powers to both levels of government, not concurrent powers, although these powers are bound to interact in the realities of the life of our Constitution. [Emphasis added.]

78 *Canadian Western Bank*, above note 8 at para. 33.

79 *Bell* (1988), above note 71..

80 They cite Lord Atkin's famous metaphor at *Canadian Western Bank*, above note 8 at para. 34.

> The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial power. It is true that doctrines like interjurisdictional immunity . . . and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.[81]

The contemporary dominant tide "finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government."[82] Accordingly, Binnie and LeBel JJ. rejected "the sweeping immunity"[83] argued for by the banks in this case.

Given the general downgrading of interjurisdictional immunity by the Supreme Court of Canada, it is surprising to see that the British Columbia Court of Appeal has recently carved out a *new* role for the doctrine in the provincial health sphere.[84] The Court of Appeal noted that Binnie and LeBel JJ. confirm that the doctrine is "reciprocal," applying "to protect provincial heads of power and provincially regulated undertakings from federal encroachment" in the same way as it does so for federal equivalents. However, it is important to point out that Binnie and LeBel JJ. were simply making a theoretical point here; they were certainly not recommending the development of a new range of provincial interjurisdictional immunity precedents. Instead, in mentioning that interjurisdictional immunity is "in theory . . . reciprocal,"[85] Binnie and LeBel JJ.'s intention was to point out that the doctrine was "in reality" available, at least in its strong form, only for the federal powers, and that this was yet a further reason for downgrading the doctrine. "For all these reasons . . . the Court does not favour an intensive reliance on the doctrine, nor should we . . . turn it into a doctrine of first recourse in a division of powers dispute."[86] Given that there are only three major stages in division of powers analysis, was the Court saying in so many words that it was a doctrine of last resort?

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81 *OPSEU v. Ontario (A-G)*, [1987] 2 S.C.R. 17, cited with approval in *General Motors*, above note 4 at 669.

82 *Canadian Western Bank*, above note 8 at para. 37.

83 *Ibid.* at para. 38.

84 *Insite*, above note 11.

85 *Canadian Western Bank*, above note 8 at para. 35.

86 *Ibid.* at para. 47.

After making very clear that the interjurisdictional immunity is out of step with the contemporary trend towards coexistence of federal and provincial laws, Binnie and LeBel JJ. then addressed the flip side of the question: when and how does the doctrine apply? At this point, the judges surveyed the range of situations in which the doctrine has been deployed in the past. They observed that the doctrine has always required some level of impact on "a vital or essential part"[87] of the federal thing, person, or undertaking, but Binnie and LeBel JJ. emphasized the narrowness of this concept by underlining Beetz J.'s limitation of its scope in *Bell (1988)* to the "basic, minimum and unassailable content"[88] or "core" of the legislative power in question. By "minimum," the justices understood Beetz J. to have been referring to "the minimum content necessary to make the power effective for the purpose for which it was conferred."[89] On the facts of *Canadian Western Bank*, this meant that the banks would have to convince the Court that promotion of "peace of mind" insurance was at the "core" of banking.

Having confirmed the narrowest interpretation of the concept of "core," the Court then went on to determine what the interjurisdictional immunity doctrine required in terms of the impact on that "core" from the other side of the division of powers. The caselaw effectively laid out a spectrum of impacts, ranging from "sterilize" at one end, through "impair" in the middle, to "affect" at the other end. Whereas the test had been pitched at "affect" by Beetz J. in *Bell (1988)*, Binnie and LeBel JJ. preferred the stricter "impair," noting that "the difference between 'affects' and 'impairs' is that the former does not imply any adverse consequences whereas the latter does."[90] Therefore, even if the Alberta Act had reached the core of banking, it would have had to adversely impact on that core rather than merely affect it. Therefore, the banks' claim failed.

We have seen thus far how interjurisdictional immunity is out of line with the contemporary currents in Canadian legal federalism, and how the Court in *Canadian Western Bank* tapered the doctrine so as to reduce its sphere of application. But the Court went further. It set down strict terms for further deployment of the doctrine:

> *Interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent*. This means, in practice,

87 *Bell (1988)*, above note 71 at 859–60.

88 *Ibid.* at 839.

89 *Canadian Western Bank*, above note 8 at para. 50.

90 *Ibid.* at para. 48.

> that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of power as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction.[91]

This passage appeared after Binnie and LeBel JJ. had just completed a survey of interjurisdictional immunity precedents under these headings: "federal transportation," "federal communication," "maritime law" (navigation and shipping), "Indian cases," "management of federal institutions" (such as the post office, the RCMP), and "federal companies and undertakings" (such as banking).

The final adjustment to the interjurisdictional immunity doctrine came in the downgrading of that doctrine *vis-à-vis* the doctrine of paramountcy. This occurred in two ways, the second of which is arguably the most important. The first way that this occurred was in the Court's assertion that paramountcy provides the federal way of doing things with sufficient protection for any matter that interjurisdictional immunity can no longer protect.[92] Thus, for example, if Parliament is not happy with provincial environmental regulations affecting the transport of hazardous materials in interprovincial vehicles, then it can legislate clearly so as to contradict the provincial rules and federal paramountcy should allow the federal preferences to prevail.[93]

The second way that interjurisdictional immunity was down graded *vis-à-vis* paramountcy was that the order of division of powers argumentation had been adjusted, placing paramountcy ahead of interjurisdictional immunity as a general rule. If we take the previous point seriously, that interjurisdictional immunity is, practically speaking, limited to situations covered by a limited range of precedents, then the interjurisdictional immunity argument should not even appear outside that range of precedents. However, even within that

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91 *Ibid*. at para. 77 [emphasis added].

92 *Ibid*. at para. 46:

> Finally, the doctrine would seem as a general rule to be superfluous in that Parliament can always, if it sees fit to do so, make its legislation sufficiently precise to leave those subject to it with no doubt as to the residual or incidental application of provincial legislation. As we shall see, sufficient confirmation of this can be found in the history and operation of the doctrine of federal paramountcy.

93 See, for example, *R. v. TNT Canada Inc.* (1986), 37 D.L.R. (4th) 297 (Ont. C.A.).

range of precedents it appears that interjurisdictional immunity may only follow the characterization and paramountcy stages. Justice Bastarache objected to this alteration in the order of constitutional argumentation, but as we have seen, the majority attempted to take care of his objections by other means. The sort of weak reading down that interjurisdictional immunity offered is to be accomplished by statutory interpretation and by firm pith and substance analysis. The stronger effects of the interjurisdictional immunity doctrine—inapplicability of provincial legislation clearly applicable on its terms to federal entities operating in the province—could not be easily resolved by interpretation and firm pith and substance analysis. However, this was where the Court's reminder regarding paramountcy kicked in. Perhaps the Court had in mind that in the twenty-first century, unlike the turn of the previous century when interjurisdictional immunity was developed, there was greater likelihood that federal legislation would have already contradicted the provincial legislation at issue. And if this were the case, as it was in *Mangat*, the Supreme Court of Canada would apparently rather hear a relatively straightforward paramountcy argument ahead of the traditionally convoluted interjurisdictional immunity analyses.

Therefore, as Binnie and LeBel JJ. said by way of conclusion to their discussion of the doctrines of division of powers analysis, "in most cases, a pith and substance analysis and the application of the doctrine of paramountcy have resolved difficulties in a satisfactory manner,"[94] without the need for interjurisdictional immunity. The judges specifically addressed "the order of application of the constitutional doctrines" later in the judgment, and there it was also clear that interjurisdictional immunity is now third fiddle, though not inflexibly so:

> The above review of constitutional doctrines inevitably raises questions about the logical order in which they should be applied. It would be difficult to avoid beginning with the 'pith and substance' analysis . . . Although our colleague Bastarache J takes a different view on this point, we do not think it appropriate to *always* begin by considering the doctrine of interjurisdictional immunity. To do so could mire the Court in a rather abstract discussion of 'cores' and 'vital and essential' parts to little practical effect. As we have already noted, interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent. This means, in practice, that it will be largely reserved for

94 *Canadian Western Bank*, above note 8 at para. 67.

> those heads of power that deal with federal things, persons or undertakings . . . . If a case can be resolved by the application of pith and substance analysis, and federal paramountcy where necessary, it would be preferable to take that approach.[95]

Given that many division of powers cases do not involve federal things, persons, or undertakings, Binnie and LeBel JJ.'s statement that "we do not think it appropriate to *always* begin by considering the doctrine of interjurisdictional immunity" should be taken with a grain of salt. The judges acknowledged as much in concluding that "while in theory a consideration of interjurisdictional immunity is apt for consideration after the pith and substance analysis, in practice the absence of prior case law favouring its application to the subject matter at hand will generally justify a court proceeding directly to the consideration of federal paramountcy."[96] In cases where prior caselaw favours the application of interjurisdictional immunity, it is probable that courts will choose the order of doctrines that suits efficient treatment of the facts. For example, in a case where the issue is whether federal legislation regarding safe transport of hazardous materials is valid, and such federal legislation is clearly in contradiction with provincial legislation dealing with the same matter, then it will be appropriate to move to paramountcy after concluding the characterization stage. However, if paramountcy is uncertain, and the applicant potentially a cross-border transportation undertaking, it may be more efficient to deal with the interjurisdictional immunity question ahead of paramountcy.

In any event, with three new lines of argument against interjurisdictional immunity set out in *Canadian Western Bank*, the result was hardly at issue. Given that the Alberta legislation did not reach the core of banking, much less impair it, the banks' appeal failed.

The final case dealing with interjurisdictional immunity in the McLachlin era was the companion case to *Canadian Western Bank*, *Lafarge*, a case that was already discussed in some detail under the heading of paramountcy. As noted in that discussion, *Lafarge* may be best understood as an illustration by the Court of the advantages of using paramountcy rather than interjurisdictional immunity, even in a case involving a traditional context for interjurisdictional immunity. Otherwise, we find in *Lafarge* numerous echoes of points made in *Canadian Western Bank*: that interjurisdictional immunity

95 *Ibid.* at para. 77 [emphasis in original].

96 *Ibid.* at para. 78.

runs against "the dominant tide of Canadian constitutional jurisprudence"[97] and that it is "an exception to the ordinary rule."[98] And, not surprisingly, Binnie and LeBel JJ. would have found no interjurisdictional immunity in the case in any event.

Ironically, although the Court went to great lengths in *Canadian Western Bank* and *Lafarge* to dissuade litigants from making complex interjurisdictional immunity arguments, some of the most important Supreme Court of Canada decisions in coming years will involve precisely this issue.[99]

F. CONCLUSION

The past fifty years of division of powers jurisprudence has been more about the doctrines and methods of analysis of legal federalism—pith and substance, double aspect, ancillary powers, paramountcy, and interjurisdictional immunity—than about new understandings of sections 91 and 92 powers. This trend only intensified with the arrival of the *Constitution Act, 1982*, the courts' focus largely diverted to the *Charter* and Aboriginal rights. The Supreme Court of Canada has been intent on encouraging flexible, co-operative federalism whereby legislation is generally upheld and disputes allocated to the intergovernmental process. The McLachlin Court has continued the trend of upholding legislation; it has also made important adjustments to constitutional doctrines and methods of analysis to promote this sort of co-operative federalism. As Binnie and LeBel JJ. stated in *Lafarge*: "Federal-provincial-municipal co-operation . . . is not unconstitutional. It is essential."[100] *Lafarge* dealt with the crowded waters of Vancouver harbour. As a result of the Supreme Court's (including the McLachlin Court's) adjustments to key division of powers doctrines, Canadian federal waters are also crowded. Federal, provincial, territorial, municipal, and other actors must remember that the exclusive anchors of sections 91 and 92 attach long anchor lines to boats and barges carrying highly varied legislative cargo, and that consequently the surface waters are a busy place where a watchful eye, a good radio, and thick bumpers are essential to the job of ensuring mutually beneficial coexistence.

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97 *Lafarge*, above note 58 at para. 4.

98 *Ibid.* at para. 41.

99 See *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536; *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453; and *Insite*, above note 11.

100 *Lafarge*, above note 58 at para. 38.